IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPLICATION NO.3535 OF 2006
IN
CRIMINAL APPEAL NO. OF 2006

Mohammed Farooque Shahdat ...Applicant.
V/s.
Mrs.Kantaben G. Savalia & Ors. ...Respondents.

Mr.B.M.Shaikh, adv. for the Applicant.
Mr.D.P.Adsule, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 16th April, 2007.
P.C.:

1. Heard Mr.Shaikh the learned counsel for the applicant. Perused the impugned judgment.

2. The applicant is original complainant. According to him, the respondent nos.1 to 3, who are partners of M/s.Siddhi Metal & Ton Containers had purchased certain goods from the applicant and towards repayment of unpaid price of the goods, they issued a cheque dated 25th June, 2001 for amount of Rs.8,50,160/- payable to M/s.A.S.Steel Corporation, which is also a partnership firm. Applicant is partner of the said firm. The cheque was presented for encashment but it was dishonoured with remarks "Funds Insufficient". Therefore, on 2nd July, 2001 demand notice was issued to the respondents by Register Post A.D. as well as under Certificate of Posting. However, notice was returned

with remarks "Not known - returned to sender" The respondent nos.1 to 3 failed to make the payment and therefore, applicant filed a complaint under Section 138 of the Negotiable Instruments Act against the respondents. After trial the learned Metropolitan Magistrate acquitted the accused persons mainly on two grounds. Firstly that the applicant had failed to produce invoice showing that the respondent had purchased goods from him on credit. Mr.Shaikh the learned counsel for the applicant contends that infact the necessary invoice about this transaction was produced before the trial Court but the learned Magistrate had not seen it. Besides this under Section 139 of the Negotiable Instruments Act there is also presumption that the cheque was issued in discharge of certain debt or liabilities. That presumption is rebuttable. Burden lies on the accused to rebut that presumption.

3. Second ground for acquittal is that the notice was not received by the accused persons and there was nothing on record to show that notice was actually served on them. It appears that notice was issued to the respondents by R.P.A.D. as well as under Certificate of Posting. Naturally the notice sent under certificate of posting could not be returned by the

postal authorities. However, the notice sent under R.P.A.D. was returned with remarks that "Not known - returned to Sender". It means that the concerned postman could not find out addressee at the given address and therefore, he returned the same. The learned Magistrate noted that correct address of the firm and all the respondent nos.1 to 3 is "510 Kalbadevi Road" while on the envelope of the notice address was "501 Kalbadevi Road". Admittedly number was wrong. It should have been "510". It was argued before the learned Magistrate that summons were also issued to the accused persons giving number of the shop as "501 Kalbadevi Road" but it was still served. However, the learned Magistrate noted that even though on the summons address was "501 Kalbadevi Road", the service report from police revealed that it was actually served on "510 Kalbadevi Road". The learned Magistrate noted that the policemen could make a search on the basis of name but the postal authorities are not expected to do that and in any case, address was not correct and therefore, it could not be said that the notice was wrongly refused or returned by the postal authorities.

4. Mr.Shaikh, in support of his contention that when the notice has been issued, there should be presumption that the notice was actually served or

addressee had knowledge that notice was actually issued, relied upon **V. Raja Kumari v. P.Subbarama AIR 2005 Supreme Court 109**. In that case Their Lordships discussed law about giving notice and presumption of service in detail in Paragraph 14. Observation made in paragraph 14 make it clear that when the sender has despatched the notice by post with correct address written on it, it could be deemed to have been served on sendee unless he proves that it was not really served and that he was not responsible for such non service. If the address on the envelope of the notice would be correct, certainly presumption could be raised in favour of the applicant/complainant but in the present case the address was wrong.

5. In view of the facts noted above, I do not want to comment about first ground of acquittal, i.e., about non production of evidence that the respondents had purchased the goods on credit. However, I find no fault in acquittal on second ground because notice was sent to the respondents with incorrect address and, therefore, postal authorities had returned the same without service. It could not be presumed that notice was served on the respondents or that they were responsible for nonservice of the same. In such circumstances, I find no fault in the order of acquittal.

6. For the reasons stated above, leave refused. Application stands rejected.

(J.H.Bhatia,J.)